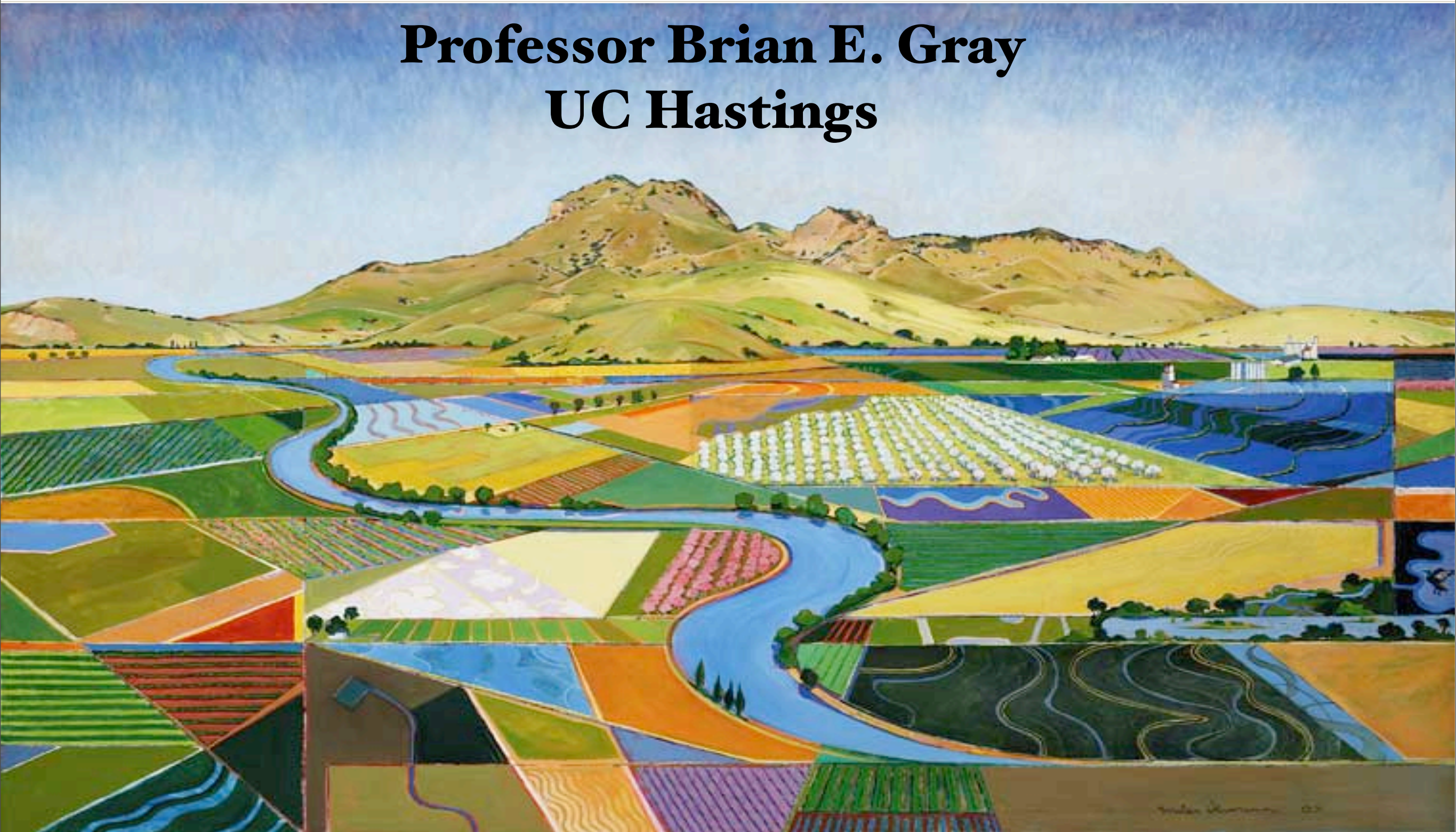


CEQA and the Draft Bay Delta Conservation Plan

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BDCP Draft EIS/EIR: Basic Requirements



National Environmental Policy Act

42 U.S.C. §§ 4321-4335

California Environmental Quality Act

Public Resources Code §§ 21000-21189.3

NEPA § 102(2)(C)

All agencies of the Federal Government shall --

include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed [Environmental Impact Statement].

CEQA § 21100(a)

All lead agencies shall prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project which they propose to carry out or approve that may have a significant effect on the environment.

CEQA § 21065

“Project” means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:

(a) An activity directly undertaken by any public agency.

* * *

(c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

BDCP Draft EIS/EIR

Lead Agencies

DWR, USBR, USFWS & NMFS

Cooperating Agencies

CDFW, USEPA & USACE

CEQA § 21067

“Lead agency” means the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment.

CEQA § 21069

“Responsible agency” means a public agency, other than the lead agency, which has responsibility for carrying out or approving a project.

Delta Reform Act § 85320(c)

The [Department of Water Resources] shall consult with the [Delta Stewardship Council] and the Delta Independent Science Board during the development of the BDCP. The council shall be a responsible agency in the development of the environmental impact report. The Delta Independent Science Board shall review the draft environmental impact report and submit its comments to the council and the Department of Fish and Game.

Delta Reform Act § 85320(e)

If the Department of Fish and Game approves the BDCP as a natural community conservation plan . . . and determines that the BDCP meets the requirements of this section, and the BDCP has been approved as a habitat conservation plan pursuant to the federal Endangered Species Act, the council shall incorporate the BDCP into the Delta Plan.

Delta Reform Act § 85320(e)

The Department of Fish and Game's determination that the BDCP has met the requirements of this section may be appealed to the council.

CEQA § 21002.1(d)

[T]he responsibility of the lead agency shall differ from that of a responsible agency. The lead agency shall be responsible for considering the effects, both individual and collective, of all activities involved in a project. A responsible agency shall be responsible for considering only the effects of those activities involved in a project which it is required by law to carry out or approve.

CEQA § 21002.1(d)

This subdivision applies only to decisions by a public agency to carry out or approve a project and does not otherwise affect the scope of the comments that the public agency may wish to make pursuant to Section 21104 or 21153.

BDCP Draft EIS/EIR: Required Contents



Contents of the EIS

NEPA Regulations

1. Description of the proposed action. CEQ Regs. § 1502.12.
2. Description and analysis of alternatives to the proposed action, including a “no action” alternative and mitigation alternatives, and identification of a “preferred alternative.” CEQ Regs. § 1502.14.
3. Description of the affected environment. CEQ Regs. § 1502.15.
4. Description and analysis of the likely adverse environmental impacts the proposed action and alternatives, including direct and indirect effects and mitigation measures. CEQ Regs. § 1502.16.

Contents of the EIR

CEQA § 21100(b)

The environmental impact report shall include a detailed statement setting forth all of the following:

- (1) All significant effects on the environment of the proposed project.
- (2) In a separate section:
 - (A) Any significant effect on the environment that cannot be avoided if the project is implemented.
 - (B) Any significant effect on the environment that would be irreversible if the project is implemented.

CEQA § 21100(b)

(3) Mitigation measures proposed to minimize significant effects on the environment, including, but not limited to, measures to reduce the wasteful, inefficient, and unnecessary consumption of energy.

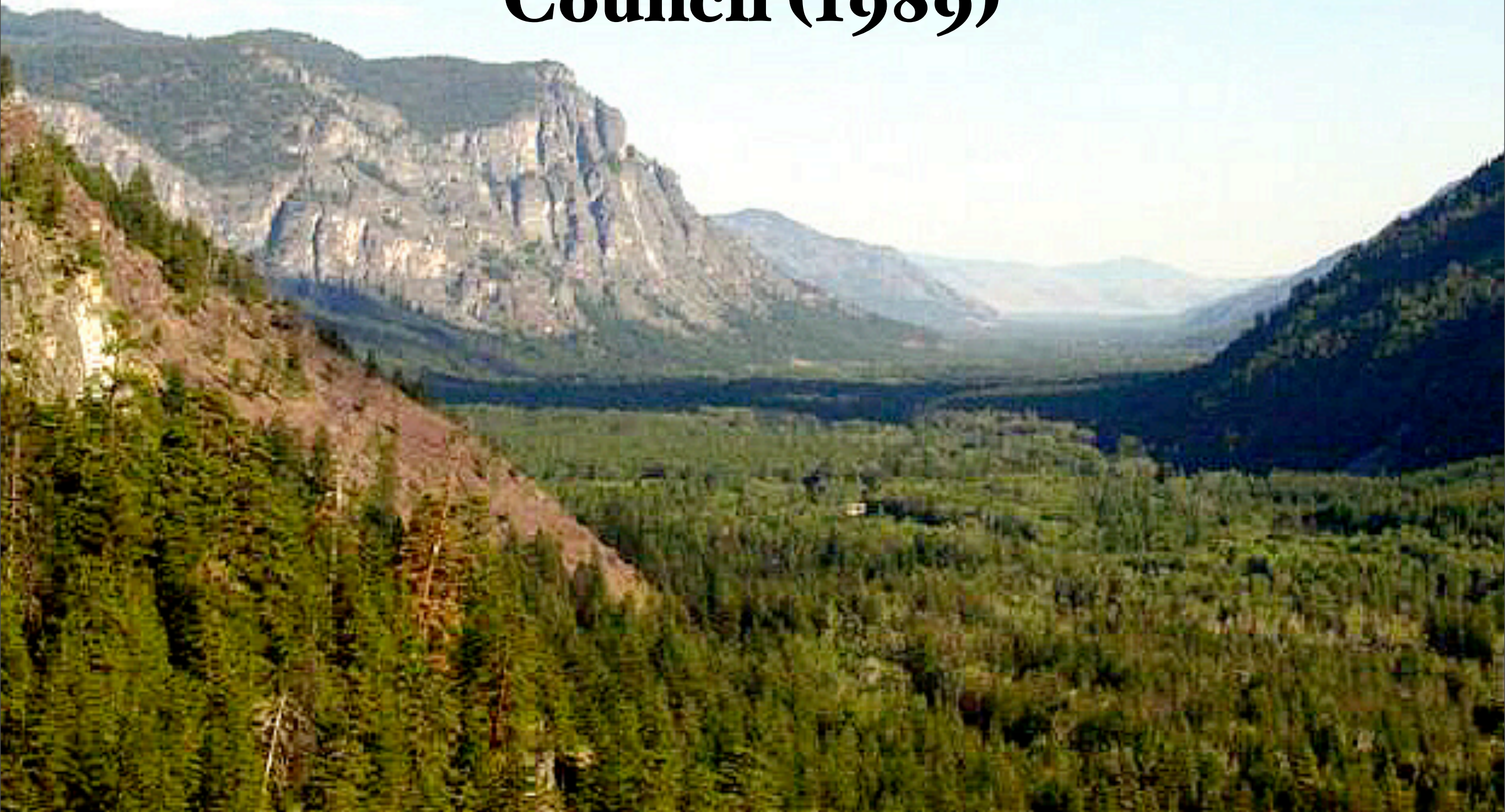
(4) Alternatives to the proposed project.

(5) The growth-inducing impact of the proposed project.

BDCP Draft EIS/EIR: Substantive Requirements



Robertson v. Methow Valley Citizens Council (1989)



Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989)

“Simply by focusing the agency’s attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast. Moreover, the strong precatory language of § 101 of the Act and the requirement that agencies prepare detailed impact statements inevitably bring pressure to bear on agencies ‘to respond to the needs of environmental quality.’ 115 Cong. Rec. 40425 (1969) (remarks of Sen. Muskie).”

“Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. . . . Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed — rather than unwise — agency action.”

Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980)

“Once an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot ‘interject itself within the area of discretion of the executive as to the choice of the action to be taken.’”

“There is no doubt that HUD considered the environmental consequences of its decision to redesignate the proposed site for low-income housing. NEPA requires no more.”

CEQA § 21002.1

In order to achieve the objectives set forth in Section 21002, the Legislature hereby finds and declares that the following policy shall apply to the use of environmental impact reports prepared pursuant to this division:

- (a) The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided.
- (b) Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.

CEQA § 21002.1

In order to achieve the objectives set forth in Section 21002, the Legislature hereby finds and declares that the following policy shall apply to the use of environmental impact reports prepared pursuant to this division:

- (a) The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided.
- (b) Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.

CEQA § 21002.1

(c) If economic, social, or other conditions make it infeasible to mitigate one or more significant effects on the environment of a project, the project may nonetheless be carried out or approved at the discretion of a public agency if the project is otherwise permissible under applicable laws and regulations.

CEQA § 21081

Pursuant to the policy stated in Sections 21002 and 21002.1, no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless both of the following occur:

CEQA § 21081

(a) The public agency makes one or more of the following findings with respect to each significant effect:

(1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.

(2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.

CEQA § 21081

(3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.

CEQA § 21081

(b) With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment.

BDCP Draft EIS/EIR: Additional Requirements of the Delta Reform Act



California Water Code §§ 85000-85350

Delta Reform Act § 85320(b)

The BDCP shall not be incorporated into the Delta Plan and the public benefits associated with the BDCP shall not be eligible for state funding, unless the BDCP does all of the following:

- (1) Complies with Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code [i.e., the Natural Community Conservation Planning Act].
- (2) Complies with Division 13 (commencing with Section 21000) of the Public Resources Code [i.e., CEQA], including a comprehensive review and analysis of all of the following:

Delta Reform Act § 85320(b)(2)(A)

A reasonable range of flow criteria, rates of diversion, and other operational criteria required to satisfy the criteria for approval of a natural community conservation plan as provided in subdivision (a) of Section 2820 of the Fish and Game Code, and other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses.

Delta Reform Act § 85320(b)(2)(B)

A reasonable range of Delta conveyance alternatives, including through-Delta, dual conveyance, and isolated conveyance alternatives and including further capacity and design options of a lined canal, an unlined canal, and pipelines.

Delta Reform Act § 85320(b)(2)(C)

The potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities considered in the environmental impact report.

Delta Reform Act § 85320(b)(2)(D)

The potential effects on migratory fish and aquatic resources.

Delta Reform Act § 85320(b)(2)(E)

The potential effects on Sacramento River and San Joaquin River flood management.

Delta Reform Act § 85320(b)(2)(F)

The resilience and recovery of Delta conveyance alternatives in the event of catastrophic loss caused by earthquake or flood or other natural disaster.

Delta Reform Act § 85320(b)(2)(G)

The potential effects of each Delta conveyance alternative on Delta water quality.

BDCP Draft EIS/EIR: Additional Requirements of the Natural Community Conservation Planning Act



Fish and Game Code §§ 2800-2835

Natural Community Conservation Planning Act § 2801

The Legislature finds and declares all of the following:

- (a) The continuing population growth in California will result in increasing demands for dwindling natural resources and result in the continuing decline of the state's wildlife.
- (b) There is a need for broad-based planning to provide for effective protection and conservation of the state's wildlife heritage while continuing to allow appropriate development and growth.

Natural Community Conservation Planning Act § 2801(c)

Natural community conservation planning is an effective tool in protecting California's natural diversity while reducing conflicts between protection of the state's wildlife heritage and reasonable use of natural resources for economic development.

Natural Community Conservation Planning Act § 2801(d)

Natural community conservation planning promotes coordination and cooperation among public agencies, landowners, and other private interests, provides a mechanism by which landowners and development proponents can effectively address cumulative impact concerns, promotes conservation of unfragmented habitat areas, promotes multispecies and multihabitat management and conservation, provides one option for identifying and ensuring appropriate mitigation that is roughly proportional to impacts on fish and wildlife, and promotes the conservation of broad-based natural communities and species diversity.

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Natural Community Conservation Planning Act § 2801(g)

Natural community conservation planning is a mechanism that can provide an early planning framework for proposed development projects within the planning area in order to avoid, minimize, and compensate for project impacts to wildlife.

Natural Community Conservation Planning Act § 2801(i)

The purpose of natural community conservation planning is to sustain and restore those species and their habitat identified by the department that are necessary to maintain the continued viability of those biological communities impacted by human changes to the landscape.

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The purpose of natural community conservation planning is to **sustain and restore** those species and their habitat identified by the department that are necessary to maintain the continued viability of those biological communities impacted by human changes to the landscape.

Natural Community Conservation Planning Act § 2820(a)

The [California Department of Fish and Wildlife] shall approve a natural community conservation plan for implementation after making the following findings, based upon substantial evidence in the record:

* * *

(3) The plan provides for the protection of habitat, natural communities, and species diversity on a landscape or ecosystem level through the creation and long-term management of habitat reserves or other measures that provide equivalent conservation of covered species appropriate for land, aquatic, and marine habitats within the plan area.

Natural Community Conservation Planning Act § 2820(a)

(4) The development of reserve systems and conservation measures in the plan area provides, as needed for the conservation of species, all of the following:

(A) Conserving, restoring, and managing representative natural and seminatural landscapes to maintain the ecological integrity of large habitat blocks, ecosystem function, and biological diversity.

Natural Community Conservation Planning Act § 2820(a)(4)

(B) Establishing one or more reserves or other measures that provide equivalent conservation of covered species within the plan area and linkages between them and adjacent habitat areas outside of the plan area.

(C) Protecting and maintaining habitat areas that are large enough to support sustainable populations of covered species.

Natural Community Conservation Planning Act § 2820(a)(4)

(D) Incorporating a range of environmental gradients (such as slope, elevation, aspect, and coastal or inland characteristics) and high habitat diversity to provide for shifting species distributions due to changed circumstances.

(E) Sustaining the effective movement and interchange of organisms between habitat areas in a manner that maintains the ecological integrity of the habitat areas within the plan area.

BDCP Draft EIS/EIR: Two Brief Editorials



Delta Reform Act § 85321

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Draft BDCP

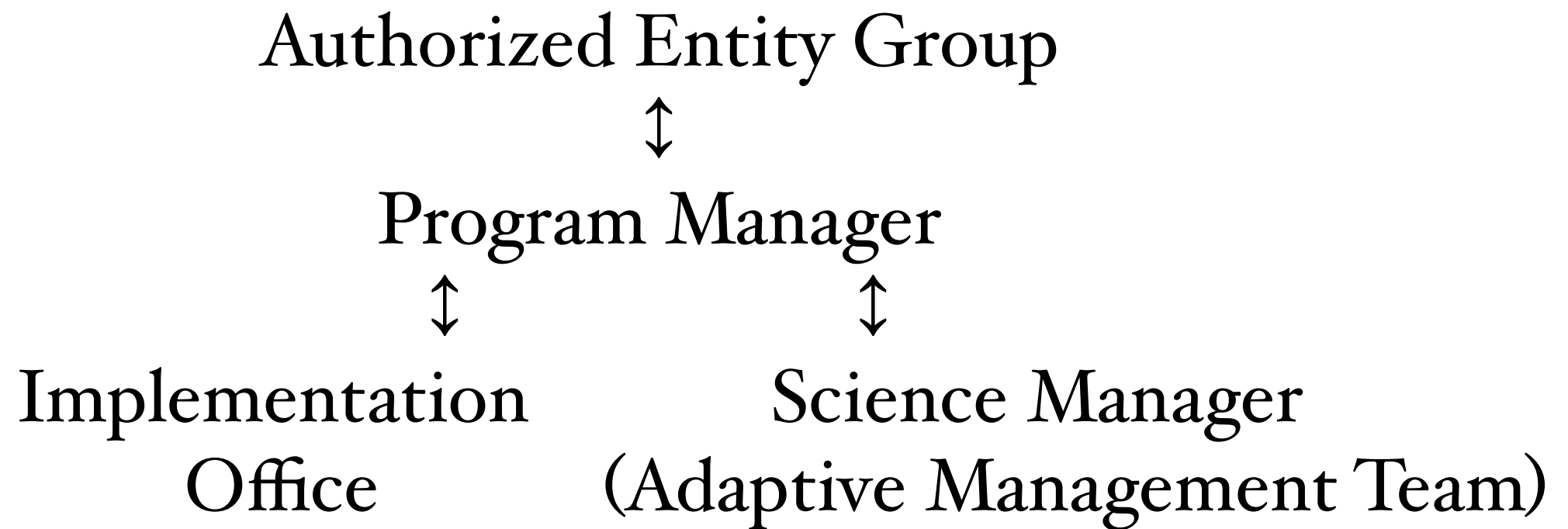
Chapter 7

Permit Oversight Group: USFS, NMFS & CDFW

Authorized Entity Group: DWR & USBR
(SWP & CVP Contractors)

Draft BDCP

Chapter 7



Draft BDCP

Chapter 7

The Permit Oversight Group “will have the following roles, among others, in implementation matters” BDCP 7-11 to 7-12 (emphasis added):

- *Approve, jointly with the Authorized Entity Group*, changes to conservation measures or biological objectives proposed by the Adaptive Management Team.
- *Decide, jointly with the Authorized Entity Group*, all other adaptive management matters for which concurrence has not been reached by the Adaptive Management Team.
- Provide input and *approve plan amendments*.

Draft BDCP

Chapter 6

“Minor modifications” include [a]djustments of conservation measures or biological objectives . . . consistent with the monitoring and adaptive management program and intended to enhance benefits to covered species.” BDCP 6-46.

Draft BDCP

Chapter 6

“If any Authorized Entity disagrees with the proposed minor modification or revision for any reason, the minor modification or revision will not be incorporated into the BDCP.” BDCP 6-46.

Draft BDCP

Chapter 6

“Formal amendments” include:

- Changes to the geographic boundary of the BDCP.
 - Additions of species to the covered species list.
- Increases in the allowable take limits of covered activities or the addition of new covered activities to the Plan.
- Substantial changes in implementation schedules that will have significant adverse effects on the covered species.

Changes in water operations beyond those described under CM1
Water Facilities and Operations. [BDCP 6-47.]

Draft BDCP

Chapter 6

Formal amendments “will be subject to review and approval by the Implementation Office and the Authorized Entities.” BDCP 6-47.

***In re* Bay-Delta Programmatic
Environmental Impact Report
Coordinated Proceedings**

**California Supreme Court
43 Cal. 4th 1143 (2008)**

“CALFED properly exercised its discretion when it declined to carry the reduced export alternative over for study into the final PEIS/R after concluding that such an alternative would not achieve the CALFED Program’s fundamental purpose and thus was not feasible.”

“The PEIS/R . . . clearly states that “improv[ing] export water supplies” is one of several objectives that must be collectively met to accomplish the overall water supply reliability goal. Because CALFED’s goal of water supply reliability encompasses all beneficial uses of Delta water, it cannot be achieved by an alternative that benefits some groups of water users at the expense of other users.”

“As the CALFED PEIS/R itself recognizes, Bay-Delta ecosystem restoration to protect endangered species is mandated by both state and federal endangered species laws, and for this reason water exports from the Bay-Delta ultimately must be subordinated to environmental considerations. The CALFED Program is premised on the theory, as yet unproven, that it is possible to restore the Bay-Delta's ecological health while maintaining and perhaps increasing Bay-Delta water exports through the CVP and SWP.”

“If practical experience demonstrates that the theory is unsound, Bay-Delta water exports may need to be capped or reduced. At this relatively early stage of program design, however, we conclude that CALFED properly applied the rule of reason when it decided to consider in the PEIS/R only alternatives that have the potential to both achieve ecosystem restoration goals and meet current and projected water export demands, and that will provide balanced progress in all four of the program areas. Failure to include a reduced exports alternative thus was not an abuse of discretion.”

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The BDCP shall include a transparent, real-time operational decisionmaking process in which fishery agencies ensure that applicable biological performance measures are achieved in a timely manner with respect to water system operations.

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The purpose of natural community conservation planning is to **sustain and restore** those species and their habitat identified by the department that are necessary to maintain the continued viability of those biological communities impacted by human changes to the landscape.

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